The Journal of Business, Entrepreneurship & the Law

Volume 9
Issue 3 *Online Only Articles*

Article 1

5-15-2016

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BURWELL V. HOBBY LOBBY STORES, INC.: CREATING POWER FOR CORPORATIONS AT THE COST OF CHANGING WOMEN'S LIVES

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"No woman can call herself free who does not own and control her body. No woman can call herself free until she can choose consciously whether she will or will not be a mother."[2]

I. INTRODUCTION

The *Burwell v. Hobby Lobby Stores, Inc.*[3] ("Hobby Lobby") decision raised many questions about societies' religious freedom and the failure to provide women with necessary healthcare needs.[4] Hobby Lobby operates 514 stores, with a presence in 41 states and employs more than 13,000 employees nationwide.[5] While the company is a secular for-profit corporation, they have set forth formal policies and practices that revolve around the Christian faith.[6] The *Hobby Lobby* decision has had a substantial impact on American society. The decision brought about an immense amount of change that impacted thousands of women who worked for the Hobby Lobby stores, because it specifically held to "exclude from coverage 'any FDA-approved contraceptives that would prevent implantation of a fertilized egg.'"[7] Hobby Lobby, along with the family affiliated Christian bookstore Mardel,[8] sought the mandate that allowed employers to oppose

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[1] Juris Doctor, Pepperdine University School of Law, 2016.

[2] Margaret Sanger, *A Parents' Problem or Woman's?*, BIRTH CONTROL REV., Mar. 1919, at 6, https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=226268.xml .

[3] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[4] Steven J. Willis, *Corporations, Taxes, and Religion: The Hobby Lobby and Conestoga Contraceptive Cases*, 65 S.C. L. REV. 1, 4 (2013).

[5] Willis, *supra* note 4, at 5–6.

[6] *Id.*

[7] Jeremy Thomas Harbaugh, *Recent Case Developments—Federal Appellate Court Holds That a For-Profit Corporation Can Challenge the Contraception Mandate Under the RFRA*, 39 AM. J.L. & MED. 692, 692 (2013).

healthcare plans that cover preventative care and screenings for women on moral and religious grounds.[9]

The main issues raised under *Hobby Lobby* include whether the owners of a business or corporation can force their religions upon their employees, whether a business can be identified as a person who has religious beliefs, and how religion and morals correlate with business corporations.[10] The overarching issue here remains centralized around women who are being impacted by this decision, and the corporations that are implementing this mandate upon their female employees. The government's imposition of this mandate was solely on the corporation as an entity, and not upon the owners, thus making the corporation itself completely separate from its owners and executives.[11] If a corporation is identified as a separate entity from its owners, then how is it that this inhuman entity can exercise religion? Arguably, corporations are associational persons because they exist to produce capital with other individuals who have common economic and commercial goals.[12]

In *Hobby Lobby*, the corporation was closely identified with the religious practices of its owners and executives; an individual's fundamental religious right is as critical as state protection of individual rights, however, this mandate has no effect on the individual's faith but rather on the corporation's business practices.[13] Here, the underlying issue was that no federal appellate court had ever identified

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[8] *Hobby Lobby*, 134 S. Ct. at 2765. The son of David Green, the founder of Hobby Lobby arts-and-crafts stores, started an affiliated business called Mardel. *Id.* The son operates Mardel as a for-profit corporation, consisting of around thirty-five Christian bookstores and employing more than 400 people. *Id.*

[9] *Id.* (noting that Hobby Lobby and Mardel did not qualify for the mandate that allows them to oppose FDA-approved contraceptives and screenings on moral grounds, at which point the companies filed suit to challenge the mandate).

[10] Willis, *supra* note 4, at 9.

> The law of business organizations is replete with examples of the separateness of the organization from its owners. Initially, shareholders are not, qua shareholders, liable for the debts and obligations of the corporation. The management and affairs of the corporation are vested not in the shareholders but rather in the board of directors. The property of the corporation is that of the corporation as a legal entity distinct from the shareholders, and those assets are not available to satisfy the personal debts of the shareholders. An individual shareholder is not, as a shareholder, an agent of the corporation, and neither is the entire body of shareholders.

Thomas E. Rutledge, *A Corporation Has No Soul—the Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 W.M. & MARY 1, 19–20 (2014).

[11] Willis, *supra* note 4, at 22. The Supreme Court famously observed "[a] corporation is an artificial body, invisible, intangible, and existing only in contemplation of law." Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819).

[12] Willis, *supra* note 4, at 21–22.

> The government does not directly argue against associational or representative standing; instead, it asserts that the burden imposed by the mandate falls only on the corporation rather than its owners. Hence, even if associational standing is appropriate, the owners can assert no injury. The government's argument relies heavily on the separate entity wall. Essentially, this argument suggests that the owners elected to form a corporation separated from themselves and, thus, waived their representative rights.

Id. at 22.

[13] *Id.* at 28 ("[I]n *Hobby Lobby*, the corporation and its owners are closely identified; essentially, they are one and the same in terms of beliefs because the owners are small in numbers and unified in position.").

business corporations with religious freedom under the first amendment of the United States Constitution.[14]

The *Burwell v. Hobby Lobby*[15] decision has now opened the door for business corporations to be identified as "persons." This type of identification allows for the corporations to be recognized in connection with a particular religious faith. This holding has enabled corporate entities to acquire more power than ever before. And giving this authority to corporations has led to opting out of the contraceptive mandate and thus further admonished the health care rights that are given to many female employees employed through Hobby Lobby stores. The power that is now in the hands of business corporations may have drastic impacts on the future of businesses and their employees. The women who work amongst the thousands of male employees of Hobby Lobby stores, Conestoga, and Mardel, will consequently feel the impact of such changes. The importance of the contraceptive mandate was overlooked and the people behind large for-profit corporations fail to see the benefit of promoting public health and gender equality.[16] Furthermore, this also disregards the probability of many negative repercussions this decision may have on women in the work field, the unemployment rates, the power that is overhauling corporations and taking away from the health of their employees, and the impact on a society filled with women in the work force. Thus, making it necessary to analyze this decision, the background of the decision makers, and the possibility of future ramifications. Is this decision going to change women's rights in the land of the free? How much power can the corporate moguls gain while simultaneously diminishing the rights of their employees? This "power," given to for-profit corporations, holds many changes in the future of large corporations and their employees, alongside the impact of the success of their businesses and the repercussions of the employees in the long run.

II. HISTORICAL BACKGROUND

The Department of Health and Human Services[17] ("HHS"), under the Patient Protection and Affordable Care Act of 2010,[18] requires employers to provide

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[14] *Id.* at 36. While most federal courts have either refused to grant or declined to address First Amendment religious freedom rights with respect to corporations, they have recognized other corporate constitutional rights such as freedom of speech, freedom of the press, equal protection and protection against unreasonable takings. *Id.* at 35, 36.

[15] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

> Thousands of female Hobby Lobby employees and covered female dependents who do not share Hobby Lobby's anti-contraception beliefs would be required to pay for or forgo contraceptives that Hobby Lobby's health plan would otherwise cover . . . [T]he religious accommodation sought by Hobby Lobby would impose on employees significant costs that would not exist without the exemption.

Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 57 (2014).

[16] *Hobby Lobby*, 134 S. Ct. at 2778.

[17] U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/about/ (last visited Apr. 20, 2016) ("It is the mission of the [HHS] to enhance and protect the health and well-being of all Americans. [HHS] fulfills that mission by providing for effective health and human services and fostering advances in medicine, public health, and social services.").

[18] Patient Protection and Affordable Care Act, 42 U.S.C. §§ 300gg et seq., Pub. L. No. 111–48,

healthcare plans that include preventive care and screenings for women.[19] There are twenty contraceptive methods that are approved for coverage, and about four of those are for preventing an unfertilized egg from attaching to the uterus, thus preventing pregnancies.[20]

The *Hobby Lobby* lawsuit was brought forward by David and Barbara Green, owners of the Hobby Lobby arts and crafts stores, together with the Christian bookstore, Mardel, which is owned by their son Mart Green.[21] Two other individuals involved in the suit were Norman and Elizabeth Hahn, who are owners of Conestoga Wood Specialties, and devout members of the Mennonite Church that opposed abortion and maintains the belief that the fetus, even at the earliest stages, shares the same humanity.[22] The Greens and the Hahns both objected to the same four types of contraceptive methods, however, they have no objection to the other sixteen.[23] Due to their highly held religious beliefs, three companies and their families have brought suit against HHS for the sole purpose that providing contraceptive plans would go against their faith.[24] They brought suit under the Religious Freedom Restoration Act ("RFRA") and the Free Exercise Clause, "seeking to enjoin application of the contraceptive mandate insofar as it requires them to provide health coverage of the four objectionable contraceptives."[25] When Hobby Lobby and Mardel initially challenged this mandate, the district court denied the plaintiffs' motion because they did not have the right to extend this to their secular for-profit corporation.[26] The Third Circuit also held that a for-profit corporation could not engage itself in particular religious activity under RFRA or the First Amendment protection when Conestoga appealed.[27] However, when the

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124 Stat. 119 (2010) [hereinafter "Affordable Care Act"], https://www.congress.gov/111/plaws/publ148/PLAW-111publ148.pdf.

[19] *Id.* § 300gg–13.

[20] *Id.* at 2754. This contraceptive mandate has allowed for religious employers such as churches and non-profit organizations to be exempt from the mandate. *Id.* at 2763. In that case, the health-insurance issuers for such organizations must provide separate payments for contraceptive services. *Id.*

[21] Harbaugh, *supra* note 7, at 692.

[22] *Hobby Lobby*, 134 S. Ct. at 2764.

[23] *Id.* at 2766.

[24] *Id.* at 2755 (discussing suits brought by Conestoga Wood Specialties, Hobby Lobby and Mardel).

[25] *Id.*

> Applying RFRA, courts must take adequate account of the burdens a requested accommodation of religious beliefs may impose on non-beneficiaries, and that consideration will often inform the analysis of the government's compelling interest and the availability of a less restrictive means of advancing that interest, but it cannot reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties.

Mary L. Topliff, Annotation, *Validity, Construction, and Application of Religious Freedom Restoration Act, 42, U.S.C.A. §§ 2000bb et seq.*, 135 A.L.R. Fed. 121 (1996).

[26] *See* Harbaugh, *supra* note 7, at 693 ("Citing the district court's ruling on appeal, the Tenth Circuit again denied the injunction on the grounds that the protection offered by RFRA does not cover the employees' 'participation in an activity that is condemned by plaintiff[s'] religion.'"). When the plaintiffs appealed to the Supreme Court, the Court held that Hobby Lobby and Mardel both had standing to sue and were "persons" for purposes of the RFRA. *Id.*

[27] *See id.*

Greens, the owners of Hobby Lobby, appealed their case to the Tenth Circuit Court, it was reversed.[28] The court reversed the district court's denial of a preliminary injunction because they held that the corporation was indeed noticed as a person under RFRA.[29] The court held that "HHS had not demonstrated a compelling interest in enforcing the mandate against them: in the alternative, the court held that HHS had not proved that the mandate was the 'least restrictive means' of furthering a compelling governmental interest."[30] Thus, the court found that the HHS imposing the contraceptive mandate on closely held[31] corporations was a violation of RFRA.[32] When the case was appealed to the Supreme Court, a five-judge majority ruled that Hobby Lobby and Mardel can be identified as a person under RFRA, and thus are eligible to the protection granted under the Free Exercise Clause.[33] The statute that was created by Congress left a very broad

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> Those who are skeptical of these claims point out that corporations 'do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion.' Corporations 'do not pray, worship, [or] observe sacraments.' Corporations are also legally separate entities from their owners and employees. Indeed, the primary benefit of incorporating is to limit the liability of these other parties for the actions of the corporation. So why should these parties, who would fiercely oppose piercing the corporate veil in any other context, be able to take advantage of ignoring the corporation's separate identity when it comes to free exercise rights?

Alan E. Garfield, *The Contraception Mandate Debate: Achieving A Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1, 8 (2014).

[28] *See* Harbaugh, *supra* note 7, at 693.

[29] Burwell v. Hobby Lobby Stores, Inc. 143 S. Ct. 2751, 2755 ("[The Tenth Circuit] held that the Greens' businesses are 'persons' under RFRA, and that the corporations had established a likelihood of success on their RFRA claim because the contraceptive mandate substantially burdened their exercise of religion . . . .").

[30] *Id.*

[31]

> [T]he entities typically have few shareholders, which means that they are generally closely held. Statutes generally relax some—if not many—of the formalities normally expected of a corporation. As a result, the statutes tend to blur the distinction with a partnership. The term closely held is not a general corporate term of art; instead, it is descriptive of an entity with relatively few shareholders, most of whom are closely related. One might also refer to a closely held corporation as a 'family business.'

Willis, *supra* note 4, at 71–72.

[32] *Hobby Lobby*, 134 S. Ct. at 2755.

> Congress, however, retained final say over courts' decision making, at least for federal purposes, as it always does when courts interpret its laws. As enacted, RFRA appears to grant protection to corporations. If the Supreme Court holds this to be true and Congress disagrees, then Congress can amend the law accordingly. Conversely, if the Court denies standing under RFRA, then Congress can determine otherwise and adjust the law as needed. The important point is that the Court should examine this claim as a statutory matter and not a constitutional one.

Christopher S. Ross, *Shall Businesses Profit If Their Owners Lose Their Souls? Examining Whether Closely Held Corporations May Seek Exemptions from the Contraceptive Mandate*, 82 FORDHAM L. REV. 1951, 1998 (2014).

[33] *Hobby Lobby*, 134 S. Ct. at 2797; *see also id.* at 2765 (illustrating a circuit split and highlighting the Third Circuit's statement that a "for-profit, secular corporations cannot engage in religious exercise within the meaning of RFR or the First Amendment). As the Supreme Court has noted, "[i]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001). HHS's argument was

definition of the religious protection that corporations can attain.[34] However, the broad characterization was not meant to give companies such freedom that would allow for this exemption.[35] "It employed the familiar legal fiction of including corporations within RFRA's definition of 'persons,' but the purpose of extending rights to corporations is to protect the rights of people associated with the corporation, including shareholders, officers, and employees."[36] If these corporations decided to opt out and not provide the proper health insurance to their employees, they would risk facing heavy penalties.[37] Thus, these companies have decided not to opt out of providing health insurance but have held up their decision to provide insurance to their employees.[38] Health insurance comes as a benefit to many companies, because by simply providing insurance to their employees they are retaining and attracting skilled workers.[39] This allows them to stray away from government penalties and makes their company more profitable and appealing.[40] On the other hand, if business corporations decided against providing health insurance to their employees, they could make their company more marketable by providing higher wages.[41] Therefore, it technically works in the same manner because the greater compensation the employees receive would fully cover their individual health insurance coverage.[42] However, the disadvantage to this is that the government might hire a less qualified person, "because the government imposed a choice grounded on moral beliefs that protect some classes, genders, races, or ethnicities more than others."[43] Specifically, this could be very detrimental to both employers and employees in search of jobs and hiring—in this case, the issue was strictly concerning the female population. While some people's moral beliefs may advance, others' beliefs will be at a detriment because of their differences, which will evidently create a discrepancy causing females to be

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the opposite of what the court held. They argued that for-profit corporations and their owners cannot sue because the regulations that are there only apply to companies. And to do that would leave merchants with a difficult choice, "give up the right to seek judicial protection of their religious liberty or forgo the benefits of operating as corporations." *Hobby Lobby*, 134 S. Ct. at 2759.

[34] *Id.*

[35] *Id.*

> Certain "purely personal" guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the "historic function" of the particular guarantee has been limited to the protection of individuals. Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.

Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784, 789 n.1 (Minn. Ct. App. 1985) *aff'd* 389 N.W.2d 205 (Minn. 1986).

[36] *Hobby Lobby*, 134 S. Ct. at [INSERT CITATION FROM OPINION].

[37] *Id.* at 2776. If these companies decide not to provide health insurance, the penalty for Hobby Lobby would be $475 million per year, $33 million per year for Conestoga, and $15 million for Mardel. *Id.* The corporations were able to drop coverage all in all and pay a $2,000 penalty per employee. *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 2777.

[41] *Hobby Lobby*, 134 S. Ct. at 2777.

[42] *Id.* ("Group health insurance is generally less expensive than comparable individual coverage, so the amount of salary increase needed to fully compensate for the termination of insurance coverage."). *Id.*

[43] Willis, *supra* note 4, at 41.

excluded.[44] The government failed to meet the RFRA's least restrictive means standard, and HHS failed to show any other means of reaching the goal they desired without putting a burden on the exercise of religion.[45] The Court held that the regulations that were imposed on corporations and businesses were unlawful and violated RFRA.[46] They reasoned that RFRA does not allow the Federal government to take any action that "substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest."[47] HHS also maintained that the owners of the for-profit corporations lost all RFRA rights when they set up their businesses as corporations and not sole proprietorships[48] or general partnerships.[49] However, the Court turned down this argument and explained that RFRA does not discriminate in the way a business is formed, whether it is a for-profit corporation or not, in order for the people of the corporation to hold up their religious exercise.[50] In *Griswold v. Connecticut*,[51] the Court held that both men and women have a right to contraceptives.[52] Studies have shown that, "moderate copayments for preventive services can deter patients from receiving those services."[53] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[54] the Court stated "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[55] Hobby Lobby sought an exemption that put the lives of many women in jeopardy and kept them

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[44] *Id.*

[45] *Id.* "Though the Supreme Court subsequently held that Congress exceeded its Fourteenth Amendment enforcement power in applying RFRA to state and local governments, the Act still applies to the federal government and therefore to the contraception mandate." Alan E. Garfield, *The Contraception Mandate Debate: Achieving A Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1, 7 (2014).

[46] *Hobby Lobby*, 134 S. Ct. at 2759.

[47] *Id.*

[48] *Sole Proprietorship*, U.S. SMALL BUS. ADMIN.: STARTING & MANAGING, https://www.sba.gov/content/sole-proprietorship-0 (last visited Mar. 10, 2016).

> A sole proprietorship is the simplest and most common structure chosen to start a business. It is an unincorporated business owned and run by one individual with no distinction between the business and you, the owner. You are entitled to all profits and are responsible for all you business's debts, losses and liabilities.

Id.

[49] *Partnership*, U.S. SMALL BUS. ADMIN.: STARTING & MANAGING, https://www.sba.gov/starting-business/choose-your-business-structure/partnership (last visited Mar. 10, 2016).

> Treating corporate free exercise as derivative of the owners' beliefs does not solidify the doctrinal move toward for-profit conscience. Corporations, as conglomerate entities, exist indefinitely and independently of their shareholders. They carry out acts and affect individual lives, and have an identity that is larger than their constituent parts. Walmart is Walmart, even when Sam Walton resigns.

Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER, SOC. & POL'Y LAW 303, 317 (2014).

[50] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[51] Griswold v. Connecticut, 381 U.S. 479 (1965).

[52] *Hobby Lobby*, 134 S. Ct. at 2780.

[53] Brief for Petitioners at 50, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13–354), 2014 WL 173486, at *50.

[54] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[55] *Hobby Lobby*, 134 S. Ct. at 2751, 2788 (2014) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992)). "Women paid significantly more than men for preventative care . . . cost barriers operated to block many women from obtaining needed care at all." *Id.*

away from the contraceptive methods that they needed due to their differing beliefs from the corporate entities.[56] This keeps women from equally participating in the economic and social aspects of this nation and creates a burdensome and expensive process for receiving the essential preventive care that is necessary.

The Court looked at the Free Exercise Clause of the First Amendment to decide whether the challenged action substantially burdened the free exercise of religion.[57] The Court applied the balancing test to determine whether the government had a compelling interest.[58] When the Court applied the balancing test they looked at two cases: *Sherbert v. Verner*[59] and *Wisconsin v. Yoder*,[60] both involving issues of religious freedom in which the Court distinguished the necessity to uphold a persons religious exercises over employers and schools that are burdening ones faith.[61] Moreover, in the case of *Employment Division, Department of Human Resources of Oregon v. Smith,*[62] the Court rejected the balancing test that was used to determine if there was a violation of the Free Exercise Clause of the First Amendment.[63] However, the Court decided against using the *Sherbert* balancing test because the test could allow for constitutionally required religious exemptions of all types of civil duties.[64] Thus, the Court then enacted RFRA, stating that, "under the First Amendment, 'neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."[65] RFRA was enacted by Congress to maintain

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[56] *Hobby Lobby*, 134 S. Ct. at 2790.

[57] *Id.* at 2760.

[58] *Id.*

[59] Sherbert v. Verner, 374 U.S. 398, 399 (1963).

[60] Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

[61] *Id.* In *Sherbert*, an employee was fired for refusing to work on her Sabbath and was denied unemployment benefits. Sherbert v. Verner, 374 U.S. at 399. The Court held that you could not be denied unemployment benefits if you were fired for complying with your religious faith. *Id.* at 410. In *Yoder*, the Court held that Amish children could not require students to go to school until the age of 16, when their religious beliefs said contrary. Wisconsin v. Yoder, 406 U.S. at 234–36.

[62] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

> In [*Smith*], the United States Supreme Court determined that the state of Oregon could deny unemployment benefits to drug rehabilitation counselors who were fired for violating a state law prohibiting the use of peyote, a hallucinogenic drug, even though their religious beliefs included the use of the drug as part of religious ceremonies. The Court ruled that a neutral law of general applicability—here, a law banning the use of peyote—applies to everyone including those whose religious rights could be impacted by the law. So long as the law was not passed to specifically impact a person's right to religious freedom, such a law is deemed neutral because it applies to everyone. The Court explained that to hold otherwise would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." The Court noted that religious beliefs did not excuse people from complying with laws forbidding polygamy, child labor laws, Sunday closing laws, laws requiring citizens to register for Selective Service, and laws requiring the payment of Social Security taxes. It should be noted that the courts in the California and New York Catholic Charities cases, applied the Smith neutral laws doctrine.

Karen Gantt, *Balancing Women's Health and Religious Freedom Under the ACA*, 17 QUINNIPIAC HEALTH L.J. 1, 23 (2014).

[63] *Hobby Lobby*, 134 S. Ct. at 2760.

[64] *Id.*

[65] *Id.* at 2761.

that if the government did interfere with a person's religion, that person is entitled to exemption from the rule unless it, "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[66]

Under the Patient Protection and Affordable Care Act of 2010 ("ACA"), the HHS regulations required that employers with at least fifty or more full time employees provide a health plan and/or insurance coverage that include the minimum essential and necessary coverage.[67] Both owners had companies that were much larger than fifty people so this was not an issue. The principle issues were the terms "person" and "exercise of religion."[68] These terms were the core issue for Hobby Lobby and Conestoga because it was the basis of their argument to the Supreme Court. However, the dissent argued that neither corporation was protected under RFRA, because it is impossible for a corporation to exercise religious freedom.[69] In *Smith,*[70] the exercise of religion did not solely consist of belief, but rather the actual physical exercise of religion.[71] Some lower courts also made the argument that for-profit corporations are not eligible to exempt themselves due to the fact that they make money; however, modern corporate law does not allow the sole purpose of making money to be the object that negates other necessities and beliefs.[72] The issue between for-profit corporations[73] and non-profit corporations[74] is not clear-cut, and while HHS argued that for-profit

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[66] *Id.* ("As enacted in 1993, RFRA applied to both Federal Government and the States, but the constitutional authority invoked for regulating federal and state agencies differed. As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work, but in attempting to regulate the States and their subdivisions, Congress relied on its power under Section 5 of the Fourteenth Amendment to enforce the First Amendment.").

[67] *Id.* at 2762.

[68] *Id.* at 2769.

[69] *Hobby Lobby*, 134 S. Ct. at 2769.

[70] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 872 (1990). "[T]he free exercise claims of corporations might receive only rational basis review under Smith, if for-profit corporations have free exercise rights, then any substantial burden on those rights would trigger strict scrutiny review under RFRA." Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U.L. REV. 589, 608–09 (2014).

[71] *Emp't Div., Dep't of Human Res. of Or.*, 494 U.S. at 877 ("[P]hysical acts [including]: assembling with others for a worship service, participating in a sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.").

[72] *Hobby Lobby*, 134 S. Ct. at 2771.

[73] Carter McNamara, *Two Basic Types of Organizations: For-Profit (Business) and Nonprofit*, FREE MGMT. LIBRARY, http://managementhelp.org/organizations/types.htm#anchor1387164.

> A for-profit organization exists primarily to generate a profit, that is, to take in more money than it spends. The owners can decide to keep all the profit themselves, or they can spend some or all of it on the business itself. Or, they may decide to share some of it with employees through the use of various types of compensation plans, e.g., employee profit sharing.

Id.

[74] *Id.*

> A nonprofit organization exists to provide a particular service to the community. The word "nonprofit" refers to a type of business—one which is organized under rules that forbid the distribution of profits to owners. "Profit" in this context is a relatively technical accounting term, related to but not identical with the notion of a surplus of revenues over expenditures. Most nonprofits businesses are organized into corporations. Most corporations are formed under the corporations laws of a particular state. Every state has provisions for forming

corporations are not protected by RFRA, that is not the case.[75] In fact, not all companies that are registered as for-profit corporations are designed strictly to maximize their earnings.[76] The court stated that, "organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals."[77] HHS also argued that RFRA only codified Free Exercise Clause precedent cases of the Pre-*Smith* era, and none of those cases necessarily stated that a for-profit corporation has any religious exercise rights.[78] The Court held that this argument was flawed because the amendment actually stated: "that the exercise of religion 'shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the constitution,'" and this in no way was construed to restrict religious exercise in the pre-*Smith* decisions that the Court cited.[79]

The HHS raised the argument that providing the necessary health care coverage for women in and of itself does not destruct the embryo.[80] It technically only depends on whether women who are covered by the health plan decide to take advantage of and use one of the four contraceptive methods.[81] The Supreme Court threw out this argument on the basis that it had no position under RFRA, and the Court had no reason to address the argument because the primary concern was the burden on parties' religious beliefs.[82]

Hobby Lobby and Conestoga heavily relied on RFRA for their claim, which cites a statute for religious freedom: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government shows that application of the burden is "the least restrictive means to further a compelling governmental interest."[83] Thus, the Court's holding in *Hobby Lobby* gave religious freedom to the executives and

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> nonprofit corporations; some permit other forms, such as unincorporated associations, trusts, etc., which may operate as nonprofit businesses on slightly (but sometimes importantly) different terms. The Internal Revenue Service (IRS) gets involved because corporations are, in general, required to pay federal corporate income taxes on their net earning (another technical term, pointing to a slightly different way to the idea of a surplus of revenue over expenses).

Id.

[75]

> Many charities make profits, with hospitals and schools being the most common examples. Certainly, both the statute and the regulations permit charities to operate profitmaking activities that comprise a majority—or even all—of what they do. In such cases, the for-profit activities must be *per se charitable*; that is, they must actually *accomplish* an exempt purpose. Charities may also conduct for-profit activities that merely *further* an exempt purpose. In those cases, the profitmaking activity must be less than primary, but may still be substantial.

Willis, *supra* note 4, at 64.

[76] *Id.*

[77] *Hobby Lobby,* 134 S. Ct. at 2771.

[78] *Id.* at 2772.

[79] *Id.*

[80] *Id.* at 2777.

[81] *Id.*

[82] *Id.* at 2778.

[83] 42 U.S.C § 2000bb-1(a), (b)(2).

leaders of a corporation, overlooking the beliefs of the company's employees. The religious freedom granted to businesses and corporations is not fully accessible to those companies' employees.[84] This decision may leave a strong impact on the employee's of Hobby Lobby, Conestoga, Mardel, and many other companies that may subsequently follow in the footsteps of these corporate entities. The women are the ones being affected, for their voices fail to be heard amongst giant for-profit corporations in our nation. The impact and future of these females has yet to be seen, but it is necessary to distinguish the issues and repercussions that may arise from the Supreme Court's holding.

III. HOW FAR CAN CLOSELY HELD FOR-PROFIT CORPORATIONS REACH?

In *Hobby Lobby*[85] the Supreme Court held that it was their responsibility to enforce RFRA, which imposes that the HHS mandate is unlawful.[86] The Court decided, that based on the RFRA statutory violations, it does not have to reach to look at the First Amendment claims brought forward by Conestoga and Hahns, considering the violation was already clearly distinguished.[87] While the owners of Hobby Lobby and Conestoga prevailed and attained the right to their religious freedom, there are many remaining issues with this decision. The dissenting opinion raises the concern that this decision may bring about a possibility of hiring discrimination among exempt employers.[88] This discrimination could lead to refinement based on one's race, faith, and appearance because of an employer's religious practice.[89] Certain ideologies that are represented by one's religion may become the basis of discrimination in the instance that a person does not fit into an employer's belief system. For example, in Islam, a woman wears a hijab,[90]

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[84] Editorial, *Hobby Lobby Ruling is a No Win for Religious Freedom: Editorial,* LOS ANGELES DAILY NEWS (June 30, 2014, 4:24 PM) http://www.dailynews.com/opinion/20140630/hobby-lobby-ruling-is-no-win-for-religious-freedom-editorial. "[I]t is a victory for the freedom of a few powerful business owners to impose their beliefs on thousands of others." *Id.* "People who consider themselves religious should search their souls long and hard before applauding." *Id.*

[85] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[86] *Id.* at 2785 (noting that the Supreme Court affirmed the Tenth Circuit's decision and reversed the judgment of the Third Circuit, remanding the case for further proceedings.)

[87] *Id.*

> From the Court's point of view, the case had nothing to do with the First Amendment—and if it had, Hobby Lobby and its owners might not have prevailed. Indeed, the reason that Congress overwhelmingly passed RFRA in the first place (97-3 in the Senate, by acclamation in the House) was a disturbing Supreme Court decision in 1990, Employment Division v. Smith, which lowered the First Amendment's protections for religious liberty. The decision in *Smith* held that the First Amendment provided no special protection for religious liberty claims brought against "generally applicable laws.

John Inazu, *The First Amendment Decision Nobody's Talking About*, CHRISTIANITY TODAY (July 1, 2014) http://www.christianitytoday.com/ct/2014/july-web-only/first-amendment-decision-mccullen-coakley-hobby-lobby.html.

[88] *Hobby Lobby*, 134 S. Ct. at 2783.

[89] *Id.*

[90] *What is the Hijab and Why do Women Wear it?*, ARABS IN AM., http://arabsinamerica.unc.edu/identity/veiling/hijab/ (last visited Mar. 10, 2016).

> Hijab is referred to by various names, some of the most common of which are a veil or headscarf . . . . Muslim women choose to wear the hijab or other coverings for a variety of reasons. Some women wear the hijab because they believe that

however, other religions do not require this type of headdress. Thus, for an employer to require their employees to wear this headdress because of their own beliefs would create discrimination upon the separation of those who do not believe in the Islamic faith and refuse to wear this headdress. Religious beliefs come in all shapes and sizes, so a person who openly shows and practices their faith is subject to a certain level of protection and restriction by law and societies standards.[91] However, the beliefs of others that are not practiced openly are indicative of different protections and restrictions, which may not be as highly noticed.[92]

Throughout *Hobby Lobby*, the comprehensive issue concerns whether corporations or businesses are moral entities that can practice religion. Identifying a corporation as moral directly correlates with an object such as a plastic bag or a table—people own it and use it—however, it has no morality of its own.[93] This correlation shows that while it is an entity in many ways, it is in all respects separate from its owners and thus an amoral and nonhuman legal fiction.[94] So, what is it that allows for a nonhuman entity to control and make decisions about the reproductive systems of females in the work place? The *Hobby Lobby* exemption from the contraceptive mandate creates significant burden on a group of individuals who are identifiable, all of which are females.[95] "Thousands of female Hobby Lobby employees and covered female dependents who do not share Hobby Lobby's anti-contraception beliefs would be required to pay for or forgo contraceptives that Hobby Lobby's health plan would otherwise cover."[96] The

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> God has instructed women to wear it as a means of fulfilling His commandment for modesty. For these women, wearing hijab is a personal choice that is made after puberty and is intended to reflect one's personal devotion to God.

[91] Willis, *supra* note 4, at 43.

[92] *Id.*

[93] *Id.* at 43–44.

> The danger is not only that corporations can act at the expense of society, but also that the people who control them can act at the expense of their own shareholders, employees and customers. While the Hobby Lobby decision ostensibly addresses only a narrow set of circumstances—a corporation with relatively few owners, a religious objection to particular kinds of birth control—these sorts of limited rulings have a history of becoming more broadly cited as precedent over time . . . . Justice Ruth Bader Ginsburg argued in her dissenting opinion that a corporation might object on religious grounds to paying for blood transfusions, vaccinations or antidepressants. Other scholars say the same logic could justify a right to privacy as a shield against regulatory scrutiny, or a right to bear arms.

Binyamin Appelbaum, *They're Not Like You and Me*, N.Y. TIMES MAG., July 27, 2014, at MM14, http://www.nytimes.com/2014/07/27/magazine/what-the-hobby-lobby-ruling-means-for-america.html.

[94] Willis, *supra* note 4, at 29, 44 (noting that for contract and tort purposes, as well as accounting purposes, believe that corporations are nonliving and nonhuman entities). "Three movements over the past few decades suggest a broad view of business corporations, describing them as having at least moral rights and responsibilities. *Id.* "Two of the movements [were] top-down: the CSR movement attempt[ed] to impose moral responsibilities on corporations, as [did] the social justice movement." *Id.* "The [third] movement [was] bottom-up: the social entrepreneurship movement recognizes the moral rights of for-profit enterprises." *Id.*

[95] Gedicks & Koppelman, *supra* note 15, at 57.

[96] *Id.* These laws would likely be the same for Mardel and Conestoga Wood Specialties. Also, the tax and draft exemption would be certain to cause an increase in the burden, the religious accommodation is far more significant and burdensome to the employees and the significant costs that are being placed would not exist if this exemption was not granted.

exemption applied by *Hobby Lobby* overrides the interests of all female employees previously covered by their insurance plans, and instead gives power to the employers that observe a different faith.[97] This is a clear notion of discrimination and is therefore no different than any First Amendment free exercise claim.[98] While, religious organizations bring a variety of people together to practice the same faith, it is quite the opposite for for-profit corporations.[99] Corporations do not hire their employees to fulfill the job descriptions they are looking for in order to practice their faith together, and commonly the employees of corporations are not drawn from the same religious community.[100] Therefore, for corporations exempting themselves from this mandate "deprives employees of a valuable legal entitlement.[101]

Although, corporations have obtained this "power" to exempt themselves from the contraceptive mandate, conversely they are obstructing the promotion of public health and gender equality.[102] Instead, corporations such as Conestoga, argue that it is not for the government to say whether their religious beliefs are mistaken or insubstantial.[103] Meanwhile, they discredit the beliefs of other individuals by putting their faith above thousands of others who they employ. Through this decision, the corporations are given the capacity to undermine the beliefs of other people in the workforce because they are the owners and executives of the corporations, and thus in a higher and more powerful position. The notion that "corporations, owned by people, should have the same freedom as people" is overlooked considering the difference in power and role in economy that corporations partake.[104] "While the *Hobby Lobby* decision ostensibly addresses only a narrow set of circumstances—a corporation with relatively few owners, a religious objection to particular kinds of birth control—these sorts of limited rulings have a history of becoming more broadly cited as precedent over time."[105] Thus, "the danger is not only that corporations can act at the expense of society, but also that the people who control them can act at the expense of their shareholders, employees, and customers," which is the particular problem with the *Hobby Lobby* decision.[106] The contraceptive mandate exemption is exactly that kind of power that is in line for danger and corruption; giving power to those in

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[97] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2790, 2791 (2014) (Ginsburg, J., dissenting).

[98] *Id.* at 2791.

> The *Hobby Lobby* majority acknowledged this, and Justice Ginsburg, writing in dissent, contended that "any First Amendment Free Exercise Clause claim Hobby Lobby . . . might assert is foreclosed by this Court's decision in [*Smith*]." We cannot know for sure how the Court as a whole might have decided Hobby Lobby's claims on First Amendment grounds, but the precedent in *Smith* gives us some reason to suspect that Justice Ginsburg is right.

See supra Inazu, *supra* note 87.

[99] *Hobby Lobby*, 134 S. Ct. at 2795 (Ginsburg, J., dissenting).

[100] *Id.*

[101] Gedicks & Koppelman, *supra* note 15, at 59.

[102] *See Hobby Lobby*, 134 S.Ct. at 2799.

[103] *Id.*

[104] Appelbaum, *supra* note 93.

[105] *Id.*

[106] *Id.*

higher positions, and undermining their employees and the rest of the American population based on socioeconomic status and position in the workforce. As stated in the *New York Times*, the *Hobby Lobby* decision makes future changes in the hiring process inevitable, one being the questioning of employers about religious and political views during the interview hiring process.[107] This gives more influence to those in powerful positions and could be the beginning of an unequal society, and the start of gender and race discrimination in the work place.

IV. THE RISING FEAR OF WOMEN IN CLOSELY HELD CORPORATIONS

Over the last fifteen years, there has been a rise in the number of states that cover the mandate for contraceptives, totaling twenty-eight states to date.[108] Women who are at childbearing age spend a significantly higher amount on health care costs than men ever will in their lifetime, specifically about sixty-eight percent more.[109] This directly correlates to the costs of contraception and reproductive health care issues, which are precisely related to gender specific issues.[110] While many contraceptive methods exist, not all are tailored for all women—the difficulty is in finding which method is suitable for a female with a particular medical disorder or a female that has harmful reactions to certain methods.[111] These are all costly alternatives that a woman has to go through for her life to not be at risk.[112] The main point of concern is that, "[f]or women who need a particular contraception option at a particular time, this loss of coverage is a discrete, focused, and significant harm, especially in emergencies entailing the risk of pregnancy from coerced sex."[113] Additionally, there are other concerns that have not been addressed, such as the fact that pregnancy is tremendously harmful to women with certain medical complications.[114] "For example, pregnancy may be dangerous for women with serious medical conditions, such as pulmonary hypertension, cyanotic heart disease, and Marfan Syndrome."[115]

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[107] *Id.*

[108] Chad Brooker, *Making Contraception Easier to Swallow: Background and Religious Challenges to the HHS Rule Mandating Coverage of Contraceptives*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 169, 171 (2012). "Even with evidence that medical costs actually decline when contraception coverage is added, due to a reduction in the costs of unintended pregnancies, some states and plans still refuse to offer such coverage." *Id.*

[109] Gedicks & Koppelman, *supra* note 15, at 57.

[110] *Id.* at 58. "One of the most important preventative methods that could be offered to benefit women is universal coverage of contraceptive methods." Brooker, *supra* note 108, at 173. "The unintended health effects and the costs associated with unintended pregnancies are underappreciated, as the effects of unintended pregnancy can be felt long after the birth of the child." *Id.*

[111] *See* Gedicks & Koppelman, *supra* note 15, at 58–59.

[112] *Id.* at 58. ("Women take account costs when deciding whether to use contraceptives. If Hobby Lobby is granted an exemption, thousands of women will incur significant out-of-pocket costs or forgo altogether the contraceptives Hobby Lobby refuses to cover if they cannot afford to pay for them.").

[113] *Id.* (noting that these "closely held" corporations are depriving not just individuals who voluntarily had sex and are not in the position to be pregnant and raise a child, but what the court fails to discuss is the issue of rape and the female that has no control of the violent act that has occurred, which leads women away from jobs and for some may lead them into a position of having a child when they are not in an appropriate circumstance to raise a child or have been forced to have sex with someone without consent).

[114] *Id.*

[115] *Id.*

About half of the pregnancies in the United States are unintended pregnancies, and thus the use of contraceptives helps to prevent that from happening.[116] The prevention is not used to destroy a fetus, but rather to help a female who is not financially, mentally, or physically capable of taking care of herself or a child. Many unintended pregnancies do more harm than good. For example, women with unintended pregnancies are less likely to get prenatal care, and statistically speaking, the stress of unintended pregnancies has led many women to smoke, drink alcohol, become heavily depressed, and be involved in domestic violence, which eventually leads women to get abortions due to their surrounding circumstances.[117] Most unintended pregnancies in the United States are experienced by women between the ages of eighteen and twenty-four, who are not married, have low income or no income at all, with no degree or stable job, and most are from racial or ethnic minority groups.[118] Not only is this unreasonable for the female, but it is unjust for a child to be born into such terrible and torturous circumstances. In such conditions, the mother and the fetus are being harmed, which takes the issue beyond contraceptives into the subject of abortion.[119] This decision fails to acknowledge that preventing employees from receiving the contraceptive mandate is equivalent to depriving individuals of their employee benefits that are covered under federal law.[120] Thus, the employees become burdened because they are accommodating their employer's beliefs rather than their own.[121]

> The lives of women suffering from these conditions literally depends on their access to the contraception most effective for them. Similarly, "there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy[,]" which include the prevention of certain cancers, menstrual disorders, and acne. Again, proper treatment of women suffering from these conditions depends upon their access to particular forms of contraception.

Id. at 58–59.

[116] *Id.*

[117] *Id.* at 59.

[118] Brooker, *supra* note 108, at 174.

> The rate of unintended pregnancies in 2001 was almost three times higher among women with incomes below the federal poverty level as among those with income twice the poverty level. Of the estimated 750,000 American teenagers between the ages of fifteen and nineteen that become pregnant each year, 82% are unintended. Non-Hispanic black women were almost three times as likely as non-Hispanic white women to have an unintended pregnancy, with rates of unintended pregnancy among Hispanic women falling in between.

Id.

[119] *See* Gedicks & Koppelman, *supra* note 15, at 59.

> For example, the Court has squarely rejected religious accommodations of employers that would deprive their employees of social security benefits or the minimum wage. Depriving employees of the generally available benefits of full contraceptive coverage under the Mandate is conceptually identical to depriving them of any other generally available employee benefit mandated by federal law and thus constitutes a burden imposed on them to accommodate their employer's religious beliefs.

Id. at 59–60.

[120] *Id.* at 59.

[121] *Id.*; *see also* Richard A. Epstein, *The Defeat of the Contraceptive Mandate in Hobby Lobby: Right Results, Wrong Reasons*, 2014 CATO SUP. CT. REV. 35, 37 (2014) (statement of Mark Udall) ("The U.S. Supreme Court's Hobby Lobby decision opened the door to unprecedented corporate intrusion into

The New York Times made headlines by stating:

> The Supreme Court violated principles of religious liberty and women's rights in the last week's ruling in the Hobby Lobby case, which allowed owners of closely held, for-profit corporations . . . to impose their religious beliefs on workers by refusing to provide contraception coverage for employees with no co-pay, as required by the Affordable Care Act.[122]

The *Hobby Lobby* decision could be taking women's rights away and the consequences will arise as this decision continues to change the lives of women in the workplace.[123] Yet many maintain that this decision is not life changing because it does not force women to abstain from sex or risk pregnancy.[124] However, despite the contrasting beliefs, the health risks faced by women who have been raped or are in bad health are not clearly identified or recognized. Another significant detail is that some women use certain contraceptive pills to prevent certain female reproductive issues and many health risks, such as "dysmenorrhea (severe menstrual pain, which is a leading cause of women missing school and work), menorrhagia (excessive menstrual bleeding, which can lead to anemia), acne, migraines, endometriosis, and uterine fibroids."[125] More than 1.5 million women take contraception solely for medical reasons completely unrelated to pregnancy prevention.[126] What the Court fails to elaborate on is the concern of giving women the control they rightfully should have concerning their own bodies, and in regards to when and if they should give birth.[127]

While the law is clear on the matter of women's equality and the importance of providing health insurance to all women under ACA, this case is quite the

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our private lives. Coloradans understand that women should never have to ask their bosses for a permission slip to access common forms of birth control or other critical health services. My common-sense proposal will keep women's private health decisions out of corporate boardrooms, because your boss shouldn't be able to dictate what is best for you and your family.").

[122] Editorial, *Hobby Lobby's Disturbing Sequel*, N.Y. TIMES, July 9, 2014, at A24, http://www.nytimes.com/2014/07/09/opinion/hobby-lobbys-disturbing-sequel.html.

[123] Epstein, *supra* note 121, at 38.

[124] *Id.* ("They still retain the option of purchasing contraception independently or switching jobs. Unlike Christians in Mosul, they will not be beheaded or tortured or confined for the exercise of their beliefs.").

[125] *See* Lara Cartwright-Smith, *Benefit or Burden? Religious Employers and the Patient Protection and Affordable Care Act's Contraception Coverage Mandate*, 18 NEXUS: CHAP. J.L. & POL'Y 29, 31 (2013).

[126] Kara Loewentheil, *When Free Exercise is a Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 DRAKE L. REV. 433, 439 (2014). "'The ability of women to participate equally in the economic and social life of the [n]ation has been facilitated by their ability to control their reproductive lives.'" *Id.* at 443 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992)).

[127] *Id.* at 444 (noting that giving women their freedom to do whatever they think is best for their body is life changing in many ways; it helps expand the way they think and make better decisions because of the control and freedom they have over their own body).

> [T]he sex equality approach to reproductive rights views control over the timing of motherhood as crucial to the status and welfare of women, individually and as a class. Arguments from the sex equality standpoint appreciate that there is both practical and dignitary significance to the decisional control that reproductive rights afford women, and that such control matters more to women who are status marked by reason of class, race, age, or marriage.

Id. (alteration in original).

opposite of what the law stands for.[128] Society needs to recognize that contraception coverage is a national matter that is important throughout the world, and for reasons other than pregnancy prevention, it is a necessity and should be included under the ACA.[129] Depriving a female of the full benefits of contraceptive coverage is equal to depriving an employee of social security benefits or the required minimum wage.[130] The Court has rejected religious accommodations that would interfere with employees' rights to social security and minimum wage because they are mandated federal regulations.[131] The contraceptive mandate is also a federal regulation that constitutes a burden on the individual to accommodate their employer's religious beliefs.[132] However, for unknown reasons, this mandate is not noticed as burdensome in terms of depriving an individual of minimum wage and social security benefits. Thus, religious practice overrides females' health needs. The Court fails to recognize the burden this exemption puts on females in today's society, ranging from substantial out-of-pocket expenses to purchasing the necessary contraceptives to job loss in the female population.[133] The discrepancy that is being created between female and male employees evidently calls for many future legal issues and conflicts. Although it may not be clear at this time, the disparity and repercussions may become evident in the future. The notion of failing to provide contraceptives to women may lead to inequality and gender differences, not only in the work field, but also in society as a whole. Employee health coverage plans providing contraceptive coverage "furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force."[134] However, this decision does quite the opposite of what health coverage plans are encouraged to create, and rather than creating equality between the sexes, instead creates toleration for gender differentiations and disparities between the medical needs of males and females.

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[128] *Id.* at 444 ("Because contraception is essential for ensuring women's social and political equality, health care plans that cover all types of preventative care needed by men but do not cover one of the most basic forms of preventative care needed by women create the implication that women are second-class citizens, that using contraception and avoiding pregnancy is a woman's personal problem, and that women's social and political equality are personal problems that are not a matter of national concern.").

[129] *Id.* at 491.

> An exemption for religious employers on contraceptive coverage alone would send an entirely different message than the exemption for small businesses that are not required to provide insurance of any kind. Religious employers are thus in the same position as small-business employers with respect to the requirement: they do not have to provide health insurance—they can pay the tax instead—but if they do, they must provide contraceptive coverage.

Id.

[130] Gedicks & Koppelman, *supra* note 15, at 59–60.

[131] *Id.* at 60.

[132] *Id.*

[133] *Id.* at 55.

[134] Loewentheil, *supra* note 126, at 493 (quoting Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8724, 8728 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54)). "This is not only in the general interest of the American economy, of course, but in the specific interest of women as compared to men because they are not on equal competitive footing in the economic and employment sphere because of the disproportionate economic burden." *Id.*

V. THE FACES BEHIND THIS DECISION

The decision to allow "closely held"[135] for-profit corporations to exempt their company from the Contraceptive Mandate was decided by the nine United States Supreme Court Justices.[136] Justices Alito, Roberts, Scalia, Kennedy, and Thomas—all males—wrote the majority decision for this case.[137] Justices Ginsberg, Sotomayor, Breyer, and Kagan—four females and one male—wrote the dissenting opinion.[138] The five justices who were appointed by Republican presidents decided the final ruling, and the four in opposition to the ruling included all three of the female justices, who were appointed by a Democratic president.[139] The majority opinion refused to believe that closely held corporations legal obligations were different from their owners, because they believed that the corporate form exists to protect the people who create the companies because they are the representatives of the corporations in human form.[140] The Supreme Court's five conservative justices believed that certain forms of contraceptives amount to abortion and agreed that there are alternative methods to ensure that employees get the full health coverage they need.[141] Additionally, they formed the belief that Hobby Lobby and Mardel were identified as 'persons' under RFRA and were undeniably entitled to the protection of the Free Exercise Clause.[142] The dissenting opinion, consisting of a female majority, was guided by women's health issues and largely represents the health amendments constituted in the ACA.[143] The dissent

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[135] *Entities*, I.R.S.: HELP & RESOURCES, https://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Entities/Entities-5 (last updated Jan. 1, 2016) ("Generally, a closely held corporation is a corporation that has more than 50% of the value of its outstanding stock owned (directly or indirectly) by 5 or fewer individuals at any time during the last half of the tax year, and [i]s not a personal service corporation."); *see also* Steven Davidoff Soloman, *In Hobby Lobby Ruling, A Missing Definition Stirs Debate*, N.Y. TIMES: DEALBOOK (Sept. 2, 2014, 6:31 PM), http://dealbook.nytimes.com/2014/09/02/in-hobby-lobby-ruling-a-missing-definition-stirs-debate/?_r=0 ("In the rule proposal, the government does not even try to define a 'closely held corporation.' Instead, it has solicited comments from the public on what the definition should be. In other words, when you have a question you cannot answer, ask it back to divert attention.").

[136] Tom Cohen, *Hobby Lobby ruling much more than abortion*, CNN (July 2, 2014, 12:03 AM), http://www.cnn.com/2014/07/02/politics/scotus-hobby-lobby-impacts/.

[137] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2758 (2014).

[138] *Id.*

[139] Tom Cohen, *Hobby Lobby Ruling Much More Than Abortion*, CNN (July 2, 2014, 12:03 AM), http://www.cnn.com/2014/07/02/politics/scotus-hobby-lobby-impacts/.

> I'm guessing it's now inevitable that we'll see lawsuits from religiously owned companies saying, "The owners of this company have a deep religious objection to paying health benefits for a same-sex spouse; that's against our religion," said Jonathan Rauch, a senior fellow at the Brookings Institution, in an interview posted on the organization's website. "Based on this decision, that lawsuit will get traction. So I think gay marriage is going to come up very fast."

Id.

[140] *Closely-Held "Corporate Christians" Win Crusade Against Contraceptive Coverage*, CCH INS. LAW REPORTS: PERS. & COMMERCIAL LIAB., July 7, 2014, 2014 WL 2987057.

[141] Cohen, *supra* note 137. "Critics, however, said the decision increased already expanded rights for corporations provided by the Supreme Court's Citizens United decision in 2010 that unshackled corporate political spending." *Id.*

[142] Harbaugh, *supra* note 7, at 693.

[143] *Closely-Held "Corporate Christians" Win Crusade Against Contraceptive Coverage*, *supra* note 138.

pointed out that the Free Exercise Clause claim is ruled out by the *Smith* decision.[144] "Justice Ginsburg further found that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to be considered 'substantial,' as required by the RFRA."[145] Thus, the dissent maintains its argument that one's faith is not to stop and overpower another person's beliefs; rather, it is mainly focused on the women who are being affected the most severely.

The dissent emphasizes issues that may arise, such as discrimination in hiring employees on matters of race and religion.[146] Meanwhile, the majority opinion states that because the Government had a compelling interest to provide equal opportunity in the workforce and therefore prohibitions on racial discrimination are placed to achieve an equal opportunity.[147] Justice Alito wrote: "[w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."[148] However, this is quite the contrary to the issue at hand, considering this exemption creates less of an equal opportunity and creates more of an imbalance between males and females in the workforce. Justice Ginsburg, in her dissent, further argued that this exemption might lead to corporations objecting on religious grounds for many other medical necessities, such as blood transfusions, vaccinations, or antidepressants.[149] While the dissent puts a strong focus on the females who are strongly affected by this exemption, the majority opinion does quite the opposite. They focus more on RFRA and the corporation's representation but note that amongst the existing constitutional framework and religious acts, individual rights and liberty must be taken into consideration. The missing piece here is the aftermath and how the general female population may be affected by this exemption, considering any backlashes and future consequences the society as a whole might face.

VI. THE FUTURE OF THIS HOLDING

A bill that was recently introduced in New York requires that insurance companies that cover maternity care options must also provide abortions for the women they insure.[150] This statute blurs the line between the contraception mandate and the exemption given to businesses.[151] The statutes attempt to argue

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[144] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

> In *Smith*, two members of the Native American Church were fired from their jobs after ingesting peyote at a religious ceremony. The Court in that case held that no First Amendment violation occurs when prohibiting the exercise of religion is an incidental effect of a generally applicable and otherwise valid regulation.

Closely-Held "Corporate Christians" Win Crusade Against Contraceptive Coverage, *supra* note 138.

[145] *Id.*

[146] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2783 (2014).

[147] *Id.*

[148] *Id.* at 2768.

[149] *Id.* at 2805 (Ginsburg, J., dissenting).

[150] Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 765 (2005).

[151] *Id.*

that abortion is a vital part of health care services, because, in certain cases it is a method that can help save a woman's life.[152] However, the balance between women's needs and religious organizations seems to be very unstable:

> In deciding the legality of preventive care contraceptive legislation as applied to religious organizations, the courts in both California and New York appeared to try and balance the needs of women with the legitimate First Amendment rights to freedom of religion. However, it is clear that the religious organizations in the Catholic Charities line of cases believed that First Amendment rights should extend to church organizations as well as other religious organizations whether the mission of the organization is religious or secular.[153]

Thus, there was no stable balance because religious organizations noted that there was no strict obligation requiring them to share their religious faith with the religious faith of others.[154] However, hiring nonbelievers of their faith is the conflicting issue, because it creates disputes between individuals with differing belief systems. Before, the law made it mandatory for non-profit religious organizations that did not meet the narrow definition of 'religious employer' to cover and provide contraceptives to their employees.[155] The exemption has made some adjustments to that; now, the Supreme Court allows closely held for-profit corporations to exempt their companies from the contraceptive mandate, based on the decision that it is a violation of RFRA.[156]

Those in opposition to the mandate argue that because the mandate is new it is not identified as a sort of legal entitlement, and because it is not legally entitled to employees it does not constitute a burden on the employees that would make it a First Amendment Establishment Clause issue.[157] However, what they fail to recognize is that there is no specific period of time noted that needs to pass in order for a mandated federal benefit to become a legal entitlement.[158] Thus, whether it is

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> Recognizing the conscience concern, many of the mandatory contraceptive coverage statutes have some carve-out for religious employers. However, the exclusions in statutes adopted in several major states, such as New York and California, define religious employer very narrowly, with the idea of excluding from the operation of the statute Catholic churches themselves, but not arms of the Catholic Church such as Catholic Charities, or Catholic hospitals, universities or nursing homes.

Id. at 742–43.

[152] *Id.* "The rationale expressed by the state in articulating a requirement that an organization hire members of its own faith in order to be considered a religious employer is a desire to avoid a burden on employees who do not share the same faith." *Id.* at 761–62.

[153] Karen Gantt, *supra* note 62, at 13.

[154] *Id.* at 14.

[155] *Id.*

[156] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014).

[157] Gedicks & Koppelman, *supra* note 15, at 59.

[158] *Id.*

> As Justice Scalia has observed, once the government "makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured." For example, the Court has squarely rejected religious accommodations of employers that would deprive their employers of social security benefits or the minimum wage. Depriving employees of the generally available benefits of full contraceptive coverage under the Mandate is conceptually identical to depriving them of any other generally available employee benefit mandated by federal law and this constitutes a burden imposed

a social security mandate or contraceptive coverage, a mandate is a Federal law and no specific period makes it more or less significant. The courts, however, have based their decision on the idea of balancing religious liberty against the generalized idea of public health.[159] This issue of public health, which is going unrecognized, is the problem of thousands of women in our society. Considering that Hobby Lobby stores alone employ more than 13,000 full time employees, the repercussions to follow may be serious and alarming for the rest of our society and our justice system as a whole.

VII. CONCLUSION

The *Hobby Lobby* decision was a groundbreaking decision that changed the functioning and existence of many for-profit corporations and the lives of their employees. This decision lays a foundation that may revolutionize the future of women working for corporations, their job finding process, and their lack of employment opportunities. While this may not be problematic today, the repercussions of this decision may show up later with larger lawsuits in pursuit of equal opportunity and women's rights. "The most depressing aspect of discussions surrounding the *Hobby Lobby* litigation is the total failure to acknowledge the women who would be harmed by RFRA exemptions from the Mandate."[160] This harm to women can only remain silent for so long, and most recently, third parties have intervened and attempted to challenge this action; however, rather than from corporations these challenges are rising from students at religious universities.[161]

The Court's main objective is to balance religious freedom and liberty for all individuals throughout the United States of America, over the promotion of a general interest in public health.[162] In *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establish Clause*, it was stated that, "Under the religious accommodation provisions of Title VII, employers are obligated to accommodate the religious practices of their employees only if the cost of doing so is '*de minimis*' or insignificant."[163] The roles are switched here, and the cost of accommodating the religious practices of one's employer is much too high. In fact, they are so significantly high that they are suppressing the health needs of women in the work field and taking away their right to make decisions regarding their own body. We live in a day and age where women and men are granted the same equal protection and rights throughout our society. However, this decision "empowers the powerful at the expense of the vulnerable."[164] It opens the door for corporations to have more power to decline other health care necessities and soon

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on them to accommodate their employer's religious beliefs.

Id. at 60.

[159] *Id.* at 65.

[160] Gedicks & Koppelman, *supra* note 15, at 65.

[161] *Id.*

[162] *Id.* "One court was clueless enough to conceptualize the problem as one of determining the harm to the *government* if the exemption is granted." *Id.*

[163] *Id.* at 66.

[164] Marci A. Hamilton, *What's Really Wrong With the Decisions in Burwell v. Hobby Lobby and Conestoga Wood v. Burwell*, VERDICT (June 30, 2014), https://verdict.justia.com/2014/06/30/whats-really-wrong-decisions-burwell-v-hobby-lobby-conestoga-wood-v-burwell.

demand that their employees to be versatile to the beliefs of those in command. The *Hobby Lobby* decision is a dangerous one, with the possibility of many repercussions. Thus there should be a limit to the power attainable by closely held for-profit corporations before their demands of religious liberty comes at the expense of millions of other people.[165]

[165] *Id.*

> Justice Ginsburg is correct that the majority provided a "decision of startling breadth," possibly applying to "employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others).

Id.